Supreme Court, U.S.
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No. 88-2106

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

DAVID ROSENBERG,
Petitioner,
v.
COMERICA BANK-KALAMAZOO,
Respondent.

BRIEF OF RESPONDENT COMERICA BANK-KALAMAZOO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the mandamus petition filed by Rosenberg on October 13, 1988 with the Sixth Circuit untimely as a notice of appeal of the District Court's July 27, 1988 order, divesting the Court of Appeals of any jurisdiction to hear the appeal?

2. Did the mandamus petition filed by Rosenberg on August 26, 1988 with the District Court toll the period for filing a notice of appeal from the District Court's July 27, 1988 order?

PARTIES TO THE PROCEEDINGS

IN THE SIXTH CIRCUIT COURT OF APPEALS

Parties below: David Rosenberg, Plaintiff-Petitioner.[1]
Comerica Bank[2] and Patrick J. Farrell[3],
Defendants-Respondents.

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[1]Petitioner David Rosenberg ["Rosenberg"] was the president and sole stockholder of Superior Metal Shredders, Inc. [hereinafter the "Debtor"]. This appeal, and all previous appeals, concern actions which occurred in the Debtor's bankruptcy. While Rosenberg designated himself as "plaintiff" in the original motion to vacate and set aside the District Court's 1985 order, and as "plaintiff/appellant" in the Sixth Circuit appeal, in the underlying dispute the true party in interest was the Debtor. Throughout the approximately eight years of this litigation, Rosenberg has consistently confused his role with that of the Debtor. Since the original District Court order setting aside the abandonment concerned only the corporation, Rosenberg was never "plaintiff" and Comerica was never a "defendant." This fact was noted by the District Court in its opinions on both the motion to vacate and the mandamus petition. Therefore, at no time did Rosenberg have standing to maintain this appeal.

[2]Disclosure of corporate affiliations and financial interest: The Respondent, Comerica Bank (actually Comerica Bank-Kalamazoo), is a Michigan banking corporation owned by its holding company, Comerica, Incorporated, a publicly traded corporation.

[3]At no time was Mr. Farrell ever involved in the Debtor's bankruptcy proceeding. He appears to be joined as a defendant in the lower court solely because he purchased the Debtor's assets through the Bankruptcy Court, and made substantial investments to improve the assets. Rosenberg has not named Farrell as a Respondent in his petition for certiorari.

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REPORTS OF OPINIONS IN THE LOWER COURT

Petitioner seeks Supreme Court review of a May 19, 1989 decision of the United States Court of Appeals for the Sixth Circuit in the case entitled In re: Rosenberg, Case no. 88-1997 (6th Cir. May 19, 1989) (See Appendix IE) [hereinafter "Rosenberg II"].

Rosenberg II was one of two Sixth Circuit decisions relating to a decision of the United States District Court for the Western District of Michigan adverse to Rosenberg. In the first Sixth Circuit decision filed on November 17, 1988 In re: Rosenberg, Case no. 88-1997 (6th Cir. November 17, 1988) (See Appendix ID) [hereinafter "Rosenberg I"], the Court denied Rosenberg's "Petition for Writ of Mandamus for Recusal Under Title 28 Sec. 1361" filed with the Sixth Circuit, which sought the recusal of United States District Court Judge Richard A. Enslen and the vacation of an order entered by Judge Enslen in 1985. The Sixth Circuit reasoned that issues pertaining to recusal would not be reviewed by the Court via a mandamus petition, and that a mandamus petition could not be used as a substitute for Rosenberg's failure to appeal the 1985 order. Finally, the Court held that Rosenberg's appeal or "petition" was untimely, because it was filed more than thirty days after the entry of the District Court order refusing to set aside the 1985 order.

In Rosenberg II, Rosenberg requested reconsideration of Rosenberg I, asking the Court of Appeals to construe his mandamus petition as a notice of appeal. On May 19, 1989, the Sixth Circuit issued its opinion in Rosenberg II denying the motion for reconsideration. The Court held that the appeal would still be untimely even if the mandamus petition were to be considered as a notice of appeal, and that the Court was therefore without jurisdiction.

STATEMENT OF THE CASE

This action arises from a bankruptcy appeal from an order entered by United States District Court Judge Richard A. Enslen on November 7, 1985, in favor of Respondent Comerica dismissing an appeal of Rosenberg from an earlier bankruptcy court decision as untimely and denying Rosenberg's motion for stay pending appeal.

The action relates to the Chapter 11 bankruptcy proceeding of Superior Metal Shredders, Inc. [hereinafter the "Debtor"] filed on October 23, 1980. Rosenberg was the president and sole shareholder of the Debtor. During the five year course of the bankruptcy proceedings, the Debtor and Rosenberg were represented by two attorneys in numerous contested matters. Both counsel have since withdrawn.

On January 30, 1985, an order abandoning certain property of the Debtor was entered by the bankruptcy court pursuant to 11 U.S.C. Section 554. On August 6, 1985, United States Bankruptcy Court Judge Laurence E. Howard entered an order setting aside the order of abandonment. In re: Superior Metal Shredders, Inc., Case no. HK-80-03369 (B. Ct. W.D. Mich., August 6, 1985). Because Comerica held a security interest in the assets of the Debtor, this order permitted the assets of the Debtor to be sold by the trustee. The Bankruptcy Court denied Rosenberg's motion for stay pending appeal.

1. Rosenberg's 1985 District Court Appeal

Although he was not a party to the bankruptcy court action, on October 10, 1985 Rosenberg filed an appeal of the bankruptcy court's August 6, 1985 decision with the District Court. The appeal requested the District Court reverse the bankruptcy court's order, and stay the pending sale of the Debtor's property pending appeal. On November 7, 1985, District Judge Enslen issued a written opinion denying Rosenberg's motion for stay pending appeal, and dismissing

the appeal as untimely. In re: Superior Metal Shredders, Inc., Case no. K-85-458 (W.D. Mich., November 7, 1985) (Appendix IA). After reviewing the "long and tortured history" of the bankruptcy proceeding, Judge Enslen found that the Bankruptcy Court's August 6, 1985 order was final, and that the October 10, 1985 notice of appeal filed by Rosenberg was filed far beyond the ten day period mandated by Bankruptcy Rule of Procedure 8002(a). In dicta, the Court stated that even if the appeal had been timely filed that the Court would have denied Rosenberg's motion for stay pending appeal because the Court did not find that the Bankruptcy Court's findings of fact were clearly erroneous as required by Bankruptcy Rule of Procedure 8013. Neither Rosenberg, nor the Debtor, appealed this decision of Judge Enslen.

The assets of the Debtor were sold by the bankruptcy trustee to Comerica in the bankruptcy court on November 8, 1985[1]. Comerica then resold the assets to Kalamazoo Metal

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[1] After Comerica purchased the Debtor's assets as a secured creditor through the bankruptcy court, Rosenberg filed a second series of appeals to stop confirmation of the sale. In re: Superior Metal Shredders, Inc., Case no. K 86-35 CA4. (W.D. Mich., filed November 12, 1985). This second appeal was assigned United States District Court Judge Benjamin F. Gibson. After both the filing of briefs and oral argument, on February 10, 1986, Judge Gibson entered an order denying Rosenberg's motion for stay pending appeal, and dismissing the appeal (Appendix IIA), reasoning that virtually all of the issues raised by Rosenberg concerning abandonment and ownership of assets were barred by res judicata by reason of Judge Enslen's November 7, 1985 opinion, and that the motion for stay pending appeal had been rendered moot by virtue of Rosenberg's failure to obtain a stay before the date of the sale as required by Section 363(m) of the Bankruptcy Code [11 U.S.C. Section 363(m)]. The Sixth Circuit Court of Appeals affirmed Judge Gibson's decision in an opinion issued May 7, 1987 (Appendix IIB), reasoning that any challenge to the validity of the sale was moot because Rosenberg did not obtain a stay of the sale as required by the Bankruptcy Code, and because the record did not reflect that the sale was in bad faith. Rosenberg v. Comerica Bank, et al., Case no. 86-1273 (6th Cir., May 7, 1987) (per curiam), rehearing denied, Case no. 86-1273 (6th Cir., October 7, 1987). The Sixth Circuit denied Rosenberg's motion for rehearing in an opinion dated October 7, 1987 (Appendix IIC). Rosenberg then filed a petition for certiorari with this Court (No. 87-6142), which was denied on February 22, 1988. Rosenberg v. Comerica Bank, et al., 98 L. Ed. 2d 1011 (1988).

It is interesting to note that, with the exception of issues raised by the petition for mandamus, all of Rosenberg's arguments contained in his present petition for certiorari are the same as those upon which this Court denied certiorari in 1988. For this reason, Comerica has not briefed many of these issues because they are barred by res judicata. Furthermore, Rosenberg did not file his motion with the District Court to begin this new encore appeal until after certiorari was denied.

Recyclers, Inc., a corporation owned by Patrick J. Farrell. Farrell made extensive improvements to the site, invested over $91,000.00 to repair the assets following the sale, and is presently operating the machinery which shreds whole automobiles for scrap.

2. Rosenberg's 1988 District Court Motion to Vacate Order and Petition for Mandamus.

Almost three years after the entry of Judge Enslen's November 7, 1985 order dismissing his first appeal as untimely, and almost four months after this Court denied his petition for certiorari (in Case no. 87-6142) in the second series of appeals which raised virtually the same arguments that Rosenberg makes in the principal case, on or about June 3, 1988 Rosenberg filed a pleading with the district court entitled "Motion to Vacate and Set-Aside Prior Order of Dismissal Under Rule 60." The accompanying brief indicated that the motion was filed pursuant to the "catch all" provision of Federal Rule of Civil Procedure 60(b)(6) which permits the court to relieve a party from a final order for any other reason justifying relief from the operation of the order. In his motion, Rosenberg alleged bias on the part of Judge Enslen pursuant to 28 U.S.C. Section 455[2]. The motion requested that Judge Enslen first retroactively set aside the November 7, 1985

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[2]The federal court system is not the exclusive realm for the filing of encore appeals by Rosenberg which allege bias on the part of the trial court. On May 16, 1984, Kalamazoo County Circuit Court Robert L. Borsos entered a judgment in favor of Comerica and against Rosenberg in the amount of $115,129.85. One year later, Rosenberg filed a motion for relief from judgment pursuant to Mich. Ct. R. 2.612, which is the state court equivalent of Fed. R. Civ. P. 60(b). The motion was denied by Judge Borsos on April 14, 1986, and leave to appeal was denied by both the Michigan Court of Appeals and the Michigan Supreme Court. Comerica Bank Kalamazoo v. Rosenberg, Case no. D804-00-418 CK (Kalamazoo County Cir. Ct. April 14, 1986), leave to appeal denied, Case no. 92238 (Mich. Ct. App. November 24, 1986), leave to appeal denied, Case no. 79994 (Mich. Sup. Ct. March 31, 1987). It is important to note that, as in the principal case, Rosenberg alleged bias on the part of the trial judge during his state court appeals of the order denying his motion for relief from judgment.

order dismissing Rosenberg's first appeal, and that the Court then recuse itself from further proceedings in the matter. The motion was briefed by all parties.

On July 27, 1988, Judge Enslen entered an order denying Rosenberg's motion to vacate the 1985 order because (1) the motion was not brought within a reasonable time; (2) the motion had no substantial basis; (3) the suggestion of recusal was itself untimely; and (4) there was no basis for recusal[3] (Appendix IB). In its opinion, the Court noted that Rosenberg was attempting to appeal the same issues that he had fought, and lost, in the series of appeals which culminated in Rosenberg's first petition for certiorari to this Court.

On or about August 26, 1988, Rosenberg filed a pleading with the district court entitled "Petition for Writ of Mandamus for Recusal Under Title 28 Sec. 1361." In a written opinion and order entered on September 7, 1988, Judge Enslen denied the petition, reasoning that 28 U.S.C. Section 1361 could not be used for such purposes (Appendix IC). Judge Enslen then considered the petition for writ of mandamus as a motion to reconsider the Court's July 27, 1988 order denying Rosenberg's motion to vacate the 1985 order, and denied relief.

3. Rosenberg I.

Rosenberg then filed an almost identical mandamus petition with the United States Court of Appeals for the Sixth

[3] In its opinion, the district court noted that the 1985 order dismissing Rosenberg's appeal was a non-discretionary decision, based solely upon the fact that the appeal was untimely. See, Albright v. R.J. Reynolds Tobacco Company, 463 F. Supp. 1220 (W.D. Pa. 1979) (rejecting plaintiff's 60(b)(6) motion and holding that an allegation of bias in a dismissal based on failure to meet the jurisdictional amount was surely speculative).

Circuit.[4] On November 17, 1988, the Sixth Circuit denied the petition for writ of mandamus on the basis that issues pertaining to recusal of district court judges could not be resolved by the Court of Appeals via a mandamus petition. In re: Rosenberg, Case no. 88-1997 (6th Cir. Nov. 17, 1988) (Appendix ID). In its opinion, the Court of Appeals noted that a mandamus petition could not be used as a substitute for appeal. Finally, the Court stated that because the mandamus petition was filed with the Sixth Circuit more than thirty days after entry of the September 7, 1988 order by Judge Enslen denying Rosenberg's district court mandamus petition, that the mandamus petition filed with the Court of Appeals could not be construed as a notice of appeal mistakenly filed with the Court of Appeals.

4. Rosenberg II.

Rosenberg then requested that the Sixth Circuit reconsider its order of November 17, 1988 to construe his mandamus petition as a notice of appeal. In his motion for reconsideration, Rosenberg asked that the Sixth Circuit "grant" his Rule 60(b) motion originally filed in the district court. In an order entered May 19, 1989, the Sixth Circuit denied Rosenberg's motion for reconsideration, reasoning that even if the Sixth Circuit mandamus petition was deemed to have been filed on September 19, 1988 that it would still be untimely as a notice of appeal of Judge Enslen's July 27, 1988 order. The Court also held that the petition for mandamus filed with the district court on August 26, 1988 did not toll the period for filing a notice of appeal because the district court mandamus petition was served more than ten days after entry of the July 27, 1988 order by Judge Enslen. In re: Rosenberg, Case no. 88-1997 (6th Cir., May 19, 1989).

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[4] The mandamus petition was submitted to the Sixth Circuit on September 19, 1988, but was not filed at that time because Rosenberg did not sign the accompanying money order. The actual filing of the mandamus petition did not occur until October 31, 1988.

Rosenberg now seeks review of the Sixth Circuit decision in Rosenberg II by writ of certiorari.

SUMMARY OF ARGUMENT

A. The mandamus petition filed by Rosenberg on October 13, 1988 with the Sixth Circuit was untimely as a notice of appeal of Judge Enslen's July 27, 1988 order, divesting the Court of Appeals of any jurisdiction, which requires that this Court deny Rosenberg's petition for certiorari.

B. The mandamus petition filed by Rosenberg on August 26, 1988 with the District Court did not toll the period for filing a notice of appeal from Judge Enslen's July 27, 1988 order.

ARGUMENT

A review by the Supreme Court on writ of certiorari is not a matter of right, but rather is a matter of judicial discretion. Review will be granted only when there exists "special and important reasons" therefore. Such reasons include when a federal court of appeals has issued a decision conflicting with the decision of a different federal circuit on the same matter, or has decided contrary to the decisions of a state court of last resort, or has made a great departure from the accepted and usual course of judicial proceedings or sanctioned same by a lower court so that supervision by this Court is required. A decision by a federal court on an important question of federal law undecided by this Court, or in conflict with a decision of this Court also justifies the discretionary grant of certiorari. Rule 17.1 of the Rules of Supreme Court of the United States; 28 U.S.C. Section 1254(1).

In the instant case, Rosenberg has cited none of the Rule 17 reasons in support of his petition. As evidenced by the following, there exists no "special and important" reasons

for the grant of Rosenberg's petition. The Sixth Circuit decision from which Rosenberg seeks certiorari contains nothing novel, conflicting, or controversial. Rather, it is based upon well-established elementary principles of when an appeal must be filed pursuant to the Federal Rules of Appellate Procedure. These issues do not require further review by this Court.

A. Rosenberg's Appeal to the Sixth Circuit was Untimely

1. Rosenberg Failed to File a Notice of Appeal Within Thirty Days After the Entry of the July 27, 1988 District Court Order.

Federal Rule of Appellate Procedure 4(a)(1) requires that an appeal as of right from a district court decision on a civil matter must be filed with the district court within thirty days after the date of entry of the order appealed from. Unless an appeal is taken within this time, the reviewing court lacks jurisdiction to hear the appeal. Myers v. Ace Hardware, Inc., 777 F.2d 1099 (6th Cir. 1986).

In the principal case, the district court entered the order denying Rosenberg's Rule 60 motion to vacate and/or set aside the prior order of dismissal on July 27, 1988. Rosenberg's Sixth Circuit petition for mandamus, which he requested to be considered as a notice of appeal, was not filed until October 13, 1988, far beyond the thirty day time limit.

2. Rosenberg's Petition for Mandamus Filed With the District Court Did Not Toll the Time for Filing of a Notice of Appeal.

In Rosenberg II, Rosenberg requested that the Sixth Circuit consider the petition for mandamus filed with the Court of Appeals as a notice of appeal. As a part of its analysis, the Sixth Circuit considered whether the first petition for mandamus filed with the district court would serve as a Rule 59 motion for reconsideration which would

toll any period in which Rosenberg had to file an appeal of the district court's order of July 27, 1988 pursuant to Federal Rule of Appellate Procedure 4(a)(4). Since the district court petition for mandamus was not filed until at least August 26, 1988, more than ten days after the entry of the district court's order, the Sixth Circuit concluded that the district court petition for mandamus did not toll the period for filing a proper notice of appeal. Fed. R. App. P. 4(a)(4).

The analysis of this issue by the Sixth Circuit was both short and well reasoned.

> As we noted in our prior order, the denial of a Rule 60(b) motion is a final order immediately appealable under 28 U.S.C. Section 1291. The 30-day period for filing the notice of appeal, therefore began to run on July 27, 1988. Because the petitioner did not file a notice of appeal (or anything that could be construed as a notice of appeal) by August 26, 1988, the crucial question is whether the mandamus petition filed in the district court on that date (and construed as a motion for reconsideration) tolled the time to file a notice of appeal.
>
> Rule 4(a)(4), Fed. R. App. P., lists four types of motions which will toll the running of time to file a notice of appeal. One of these is a motion to alter or amend judgment under Rule 59(e), Fed. R. Civ. P. In this Circuit, motions for reconsideration are properly construed as Rule 59(e) motions. Huff v. Metropolitan Life Insurance Co., 675 F.2d 119, 122 (6th Cir. 1982). Such motions toll the appeal period, however, only if they are timely, i.e., served within ten days of the order for which consideration is sought. Peake v. First National Bank & Trust Co., 717 F.2d

> 1016, 1019 (6th Cir. 1983). Here, the mandamus petition/motion for reconsideration was not served within that time and did not toll the period for filing a notice of appeal. The fact the district court ruled upon the untimely motion does not affect that conclusion. Denley v. Shearson/American Express, Inc., 733 F.2d 39, 41 (6th Cir. 1984). As a result, the mandamus petition submitted to this Court on September 19, 1988, even if construed as a notice of appeal, would impart no appellate jurisdiction herein. This Court has no authority to extend the 30-day period for filing a notice of appeal. Rule 26(b), Fed. R. App. P. We therefore decline the petitioner's request to construe his mandamus petition as a notice of appeal.

Appendix IE at pp. 3-4.

Rosenberg cannot use Federal Rule of Civil Procedure 60(b) (6) as a substitute for his failure to appeal the November 7, 1985 district court order. Cf. Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 188-89 (7th Cir. 1985). Similarly, a mandamus petition cannot be used as a substitute for appeal. City of Cleveland v. Krupansky, 619 F.2d 572, 575 (6th Cir.) (per curiam), cert. denied, 449 U.S. 834 (1980). Rosenberg is attempting to use both as a substitute for his failure to appeal the November 7, 1985 district court order. It is unfair to require Comerica to continue to defend multiple appeals and repeated motions for injuctive relief in the appellate courts based upon issues litigated or decided in the past. In some cases, Rosenberg has had not only one bite at the litigation apple, but now as many as six. For this reason, Comerica believes that the Sixth Circuit decision was proper and should not be further reviewed by this Court.

CONCLUSION

There exists no special and important reason for granting review of this matter on Writ of Certiorari. Respondent Comerica Bank respectfully requests that this Court enter an order denying Rosenberg's petition for writ of certiorari forthwith so that these proceedings may finally be concluded.

Dated: July 21, 1989 Respectfully submitted,

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APPENDIX IA

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

In the Matter of:

SUPERIOR METAL SHREDDERS, INC.
DAVID ROSENBERG, File No. K85-458

Debtor

_____/

OPINION

Appellant, David Rosenberg, has filed a motion to stay the proceeding of the sale of certain property pending appeal, pursuant to Bankr. R. 8005. Prior to the discussion of this motion, a brief explanation of the long and tortured history of this case is appropriate. In 1980, the debtor corporation filed for Chapter 11 reorganization. In October 1984, the matter was finally converted to a Chapter 7 proceeding. On January 30, 1985, the trustee of the bankrupt estate gave notice as required by Section 102(1) of the Bankruptcy Code that certain real and personal property of the estate would be abandoned pursuant to Section 554 as of February 14, 1985, unless a written objection to such abandonment was filed with the bankruptcy court prior to said date. On the date that the notice was issued, counsel for Comerica Bank, a creditor of the estate with a security interest in some of the assets, began negotiations with counsel for the trustee regarding the possible sale of the subject property to an interested third party. On February 13, at the eleventh hour, the trustee determined not to sell the assets to the third party on behalf of the estate. For whatever reason, a timely objection to the abandonment was not filed by Comerica or any other interested party. There-

fore, on February 14, 1984, title to the assets revested in the debtor. See In re Tarpley, 4 B.R. 145 (Bankr. M.D. Tenn. 1980).

On April 30, 1985, Comerica filed motion in the bankruptcy court to set aside the order of abandonment and compel sale by the Trustee. A hearing on this motion was held before Hon. Laurence E. Howard on June 21, 1985. Judge Howard recognized that most courts that have considered the issue have held that a knowing abandonment of property by the trustee under Section 554 is irrevocable, and property once abandoned cannot thereafter be brought back into the estate by the trustee. See e.g., In re Burch Co., 37 B.R. 273 (Bankr. D.S.C. 1983); In re Enriquez, 22 B.R. 934 (Bankr. D. Neb. 1982); In re Tarpley, supra. However, Judge Howard also noted that the Court, as opposed to the trustee, has the ability to consider a motion for relief from its own order under Bankr. R. 9024. Rule 9024 provides that, except in factual situations inapposite to the case at bar, motions for relief from orders of a bankruptcy court shall be determined pursuant to Fed. R. Civ. P. 60. At the hearing, Judge Howard ruled that while relief from the order of abandonment was not justified under id. 60(b) (1), see Federal's, Inc. v. Edmonton Investment Co., 555 F.2d 557, 583 (6th Cir. 1977), relief was justified under the catch all provision of id. 60(b) (6). Transcript of Hearing at 33, In re Superior Metal Shredders, Inc., No. HK80-03369 (Bankr. W.D. Mich. June 21, 1985). Specifically, he noted that the assets had been tied up in the proceedings for nearly five years, that maintaining the order of abandonment would only force the parties to seek foreclosure in state court (the result of which would greatly diminish the resale value of the property), and finally that no party would be unjustly prejudiced by returning the abandoned property to the estate. Accordingly, an order setting aside the abandonment pursuant to Fed. R. Civ. P. 60(b)(6) was entered by the bankruptcy court on August 6, 1985. This order also compelled the sale of the assets by the trustee on behalf of the estate. That sale is currently scheduled to take place on November 8, 1985.

entered by the bankruptcy court on August 6, 1985. This order also compelled the sale of the assets by the trustee on behalf of the estate. That sale is currently scheduled to take place on November 8, 1985.

Appellant filed an objection to the order to set aside the abandonment on August 20, 1985. A hearing on that objection was again held by Judge Howard on September 13, 1985. Thereafter, an order denying Appellant's objection was entered on October 10, 1985. This time sequence is crucial. The August 6th order setting aside the abandonment, and directing the sale, of the assets constituted a judgment of the bankruptcy court. The objection to that order sought an amendment of that judgment. Bankruptcy Rule 9023 provides that motions for amendments of judgments under the code are governed by Fed. R. Civ. P. 59. Rule 59(e) states that: "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Computation of the 10 day period under Bankr. R. 9006(a) reveals that the last day on which Appellant could file his objection to, or otherwise move to amend, the judgment of August 6, 1985, was Monday, August 19, 1985. Furthermore, Rule 9006(b)(2) specifically precludes any enlargements of time for taking action under Rule 9023. Therefore, Appellant's August 20th objection was untimely and the bankruptcy court's judgment of August 6 was final as to the setting aside of the abandonment and the direction to the trustee to sell the assets.

Mr. Rosenberg filed his appeal from the instant action with this Court on October 10, 1985. Title 28 of the United States Code, Section 158(a), grants the district courts jurisdiction to hear appeals from actions of the bankruptcy courts. Section 158(c) provides, however, that such appeal must be taken within the time provided in Bankr. R. 8002. Rule 8002(a), in turn, states that notice of appeal shall be filed within 10 days of the judgment or order appealed from. Since the Appellant's objection of August 20, 1985 was untimely, the judgment or order appealed from was the bankruptcy court's order of August 6, 1985. Clearly, the October 8th notice of appeal was in excess of 10 days after the

judgment or order appealed from. Moreover, none of the extensions provided for in 8002(c) apply to this case. Therefore, the appeal was not timely filed under Rule 8002 and the Court lacks jurisdiction to entertain the matter of the order setting aside the abandonment and compelling sale of the assets. 28 U.S.C. Section 158(a), (c).

Alternatively, had this appeal been timely filed, vesting this Court with jurisdiction under 28 U.S.C. Section 158(a), the Court still would have denied Appellant's motion for stay pending appeal. In order to obtain a stay pending appeal under Bankr. R. 8005, the moving party must clearly establish each of the following: (1) that there is a likelihood that the moving party will be successful on the merits of his appeal; (2) that the movant will be irreparably injured unless the Court grants the stay; (3) that granting the stay will work no substantial harm to the other interested parties; and (4) the stay will not harm the public interest. In re Baldwin United Corp., 45 B.R. 385, 386 (Bankr. S.D. Ohio 1984). I specifically do not find that Judge Howard's findings of fact are clearly erroneous, Bankr. R. 8013, and the application of Bankr. R. 9024 and Fed. R. Civ. P. 60(b) (6) to those facts was appropriate. Accordingly, at least the first three prongs of the Baldwin test for granting stays pending appeal are not met.

For these reasons, Appellant's motion to denied and the case is dismissed. Should Mr. Rosenberg choose to file an appeal from subsequent orders of judgments of the bankruptcy court, new and timely notices of appeal must be properly filed. Bankr. R. 8002(b); 8 U.S.C. Section 158(a), (c). An appropriate judgment order shall be entered forthwith.

DATED in Kalamazoo, MI:_____

RICHARD A. ENSLEN
U.S. District Judge

11/7/85

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

In the Matter of:

SUPERIOR METAL
SHREDDER, INC.
DAVID ROSENBERG,

File No. K85-458

Debtor

_____/

JUDGMENT ORDER

In accordance with the written opinion filed this date, and for the reasons stated therein;

IT IS HEREBY ORDERED that the Plaintiff's motion to stay the preceeding of sale pending an appeal is DENIED.

IT IS FURTHER ORDERED that this case shall be, and hereby is, DISMISSED.

DATED in Kalamazoo MI:
11/7/85

_____
RICHARD A. ENSLEN
U.S. District Judge

APPENDIX IB

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

In the Matter of:
SUPERIOR METAL
SHREDDERS, INC.
DAVID ROSENBERG, File No. K85-458

Debtor
_____/

AS STYLED BY DAVID ROSENBERG
IN THE INSTANT MOTION:

DAVID ROSENBERG,

Plaintiff/Appellant,

v. File No. K85-458

COMERICA BANK
and
PATRICK H. FARRELL,

Defendants/Appellees,

_____/

OPINION

Presently before this Court is "plaintiff" David Rosenberg's motion to vacate and set-aside prior order of dismissal pursuant to Federal Rule of Civil Procedure 60(b)(6). Both "defendants" Comerica Bank ("Comerica") and Patrick J. Farrell ("Farrell") have filed responses to "plaintiff's" mo-

tion. The procedural and factual background to this case is somewhat complex and was previously presented in more detail in the Court's opinion of November 7, 1985. Accordingly, the Court will highlight the relevant points along with procedural timeline in summary fashion.

The "plaintiff" (as Mr. Rosenberg styles himself) was the president and sole shareholder of Superior Metal Shredders, Inc. ("Superior"). Superior filed a petition pursuant to Chapter 11 of the Bankruptcy Code in October, 1980. In October, 1984, the case was converted to a Chapter 7 proceeding. On August 6, 1985, the bankruptcy court entered an order setting aside a prior abandonment of Superior's assets by the Chapter 7 trustee, which permitted the sale of Superior's assets by the trustee. On October 10, 1985, Rosenberg filed an appeal of the order and brought a motion in this Court to stay the sale of Superior's assets pending appeal.

Bankruptcy Rule 8002 requires that a notice of appeal be filed within ten (10) days of the judgment or order appealed from. This Court held that the August 6, 1985, bankruptcy court order was, in fact, a final order from which the appeal was taken. The appeal itself was filed on October 10, 1985. Accordingly, on November 7, 1985, this Court held that it had no jurisdiction to hear the appeal, denied Rosenberg's motion and dismissed the appeal. The Court's opinion also indicated that, even assuming that the Court had jurisdiction, the grounds for appeal were without merit.

Comerica purchased Superior's assets through a court-ordered bankruptcy sale on November 8, 1985. Comerica then resold the assets to a corporation which is owned in part by Mr. Farrell. Mr. Farrell has apparently used the assets in his business since that time and has invested substantial amounts for repairs and additions to the assets. Rosenberg also filed an appeal of the order approving the sale and requested a stay of the transfer of sale proceeds pending appeal. That second appeal also contained allegations that

were almost identical to those of the first appeal which was filed with this Court. The second appeal was assigned to U.S. District Court Judge Benjamin F. Gibson who denied plaintiff's motion to stay pending appeal and dismissed the remainder of the appeal. Judge Gibson's decision was later affirmed by the United States Sixth Circuit Court of Appeals and certiorari was denied by the United States Supreme Court.[1]

It is worth noting that the Sixth Circuit agreed with Judge Gibson that "all but one of the issues raised in the second appeal had been adjudicated in the first appeal, and were therefore res to the second appeal. Only the issue of whether the sale of assets should be stayed pending appeal was not resolved in the first appeal, as the sale had not been consummated at that time. " Rosenberg v. Comerica Bank-Kalamazoo, No. 86-1273, slip. op. at 4 (6th Cir. May 7, 1987) (emphasis added). The Sixth Circuit went on to hold that "Rosenberg's failure to obtain a stay of the November 8, 1985 sale of assets [was] fatal to the only remaining issue in his appeal of the district court's [Judge Gibson's] February 10, 1986 disposition of his second appeal." Id.

The full procedural history of this case is set forth in more detail in Rosenberg v. Comerica Bank-Kalamazoo, supra. In the face of the Sixth Circuit's ruling that "the overwhelming majority of issues raised in the second appeal were barred by res judicata" (Id.), Mr. Rosenberg was faced with the problem of how to appeal yet a "third time" the decisions of the bankruptcy court as well as the decision of this Court from which Mr. Rosenberg never appealed. Put differently, Mr. Rosenberg was faced with the difficult problem of "rewriting" the procedural history of this case in order to sidestep the Sixth Circuit's res judicata ruling.

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1. Rosenberg v. Comerica Bank-Kalamazoo (In Re Superior Metal Shredders, Inc.), affirmed per curiam, No. 86-1273 (6th Cir. May 7, 1987), rehearing denied, No. 86-1273 (6th Cir. Oct. 7, 1987), cert. denied, 56 U.S.L.W. 3570 (U.S. Feb. 23, 1988).

As the Sixth Circuit noted in its opinion of May 7, 1987, "Rosenberg had made a variety of efforts to prevent and then undo [the bankruptcy court's sales of assets] culminating in this appeal." Id. at 2 (emphasis added). Mr. Rosenberg continues with those efforts and his energy level is apparently undefatigable in that he is now, once again, knock, knock, knocking on the courthouse door.

Not one to take "no," or even "No! No!" for an answer, Mr. Rosenberg has embarked on a rewriting of the history of this case that would make even the most unabashed revisionists blush. Interestingly, he employs a tactic often employed by radical revisionists: attack the objectivity of the reporter of events and/or invent facts that tend to support one's special "reading" of past events. In this case, Mr. Rosenberg's "historical analysis" suggests that this Court's jurisdictional ruling—a non-discretionary ruling—was somehow "biased." Mr. Rosenberg does not, apparently, understand that this Court's November 7, 1985 Opinion did not reach the merits of his appeal, but rather addressed only the issue of whether this Court had jurisdiction.

It is worth noting that Mr. Rosenberg has used so many different "legal aliases" in appealing these same issues over and over gain it is apparently difficult for him to keep the captions and procedural postures straight: This case, No. K85-458, was originally entitled as follows:

> In the Matter of:
> SUPERIOR METAL SHREDDER, INC.
> DAVID ROSENBERG,
>
> Debtor

The caption of Rosenberg's appeal as styled by him was:

In the Matter of:
SUPERIOR METAL SHREDDER, INC.
DAVID ROSENBERG,

Debtor

_____/
DAVID ROSENBERG,

Plaintiff,

v.

JUDGE LAURENCE HOWARD,
TRUSTEE RICHARD REMES,

Defendants.

_____/

In the new 1988 pleadings filed by Mr. Rosenberg, he styles the case thusly:

DAVID ROSENBERG,

Plaintiff,

v. File No. K85-458

COMERICA BANK
and
PATRICK FARRELL,

Defendants.

_____

Hence, in K85-458, Mr. Rosenberg now apparently believes that he is the plaintiff, and the Comerica Bank and Patrick H. Farrell are the defendants. It may be that Mr. Rosenberg's "legal-identity problems" stem, in part, from the fact that the true party in interest in the underlying bankruptcy was Superior. Although Mr. Rosenberg was the president and sole shareholder of the corporation, the order setting aside abandonment from which Mr. Rosenberg appealed concerned only the corporation. It is true that in February of 1985 after the trustee abandoned the assets of Superior, they "reverted without objection to [Superior] and thus to Rosenberg." Id. at 3. However, on August 6, 1985, the bankruptcy court ordered the abandonment set aside. On August 20, 1985, Mr. Rosenberg filed an "objection" to that order, and on October 8, 1985, of course, Mr. Rosenberg filed a notice of appeal from the August 6, 1985 bankruptcy order with this Court. It is not at all clear to the Court that Mr. Rosenberg, as the representative agent of a dissolved entity, has standing to bring this action in that he was never technically the "plaintiff" in the bankruptcy action—despite his "creative captioning." For the purposes of this opinion, however, the Court will assume that Rosenberg somehow does have standing.

Further, the record supports the observation that virtually every piece of litigation in which Mr. Rosenberg has been involved concerning Superior, results in the naming of every judicial officer who makes any decision which is adverse to the interests of Mr. Rosenberg as a defendant and/or in the saddling of those officers with charges of "bias." Defendant Comerica's brief informs the Court of Mr. Rosenberg's charge of bias on the part of Kalamazoo County Circuit Judge Robert L. Borsos, who, in a related case, entered judgment in favor of Comerica and against Rosenberg in the amount of $115,129.85. Mr. Rosenberg's subsequent appeal from Judge Borsos's denial of his motion for relief from judgment was denied by both the Michigan Court of Appeals and the Michigan Supreme Court. See Defendant Comerica's Brief at 6, n. 2.

Mr. Rosenberg now seeks to have this Court vacate its order of November 7, 1985 because he alleges that under 28 U.S.C. Section 455 the Court's failure to disqualify itself at the time the order was entered justifies relief from the final judgment pursuant to Federal Rule of Civil Procedure 60(b)(6).

Timeliness of Plaintiff's 60(b) (6) Motion

The order Mr. Rosenberg seeks to have set aside was entered almost three years ago. It has been said that "[s]ince what is a reasonable time must be determined in light of all attendant circumstances, intervening rights, loss of proof or prejudice to the adverse party, the commanding equities of the case, the general desirability that judgments be final and other relevant facts bear upon the problem." 7 J. Moore & J. Lucas, Moore's Federal Practice, paragraph 60.27[3] (2d ed. 1987).

The Court notes that in reliance upon its order of November 7, 1985, defendant Comerica purchased Superior's assets through the bankruptcy court and resold them to a new owner who has since injected substantial amounts of capital into the business. Moreover, it appears that Rosenberg knew of the "facts" which allegedly justify his 60(b) motion at least six months prior to the time he filed it because he raised the same disqualification issue in his petition for writ of certiorari in the Supreme Court of the United States dated December 21, 1987. He waited to bring this motion until he received the "bad news" on his petition for certiorari. Mr. Rosenberg never appealed this Court's order of November 7, 1985. It is clear that he is now, almost three years later, seeking to improperly use his Rule 60(b) motion as a substitute for an appeal. Cf. Andrews v. Heinold Commodities, Inc., 771 F.2d 184, 188-89 (7th Cir. 1985) (holding that pro se plaintiff's 60(b)(6) motion "appears to be an attempt to remedy his earlier omission in [the trial court] proceeding rather than to be motivated from some exceptional circumstances.").

In addition, when the Court considers the "intervening rights" of the third parties here—that is, Mr. Farrell whom Mr. Rosenberg has ironically labeled as a "defendant" in this 1985 action, together with the rights of Comerica and other businesses which have dealt with Mr. Farrell and Comerica—as well as the need for finality, it is clear that under the factual circumstances of this case, Rosenberg's motion cannot be said to have been brought within a reasonable time.

The Substantive Requirements of Rule 60(b)

In Margoles v. Johns, 798 F.2d 1069, 1073 (7th Cir. 1986) the Seventh Circuit noted that relief under Rule 60(b)(6) is "...warranted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust." The plaintiff in Margoles argued that an assistant state attorney general, during the time the trial judge has served as attorney general, had communicated with defendant newspaper's counsel in plaintiff's previous slander suit and had exchanged certain documents containing information concerning that suit. Although the court noted that some of the documents concerned information which related to the production of certain documents for use in the proceeding concerning plaintiff's 60(b) motion and/or related to other litigation brought by plaintiff, it concluded that the documents were either totally inconclusive with respect to the nature of the "relationship" between the trial judge and the defendant's counsel and/or were "patently innocuous." Margoles, 798 F.2d at 1073.

The Margoles court found that "the documents of record shed absolutely no light on whether the information requested or provided was relevant to any material factual issues that might have been disputed in the instant action. Therefore the existence of this 'relationship,' if such it be, does not present the 'extraordinary circumstances' necessary to warrant relief under Rule 60(b)(6)." Id. at 1074. Finally, the court emphasized that "[e]ven assuming that [the

trial judge] knew of these activities and the communications between his office and counsel for the defendants in the underlying slander case, the evidence and reasonable inferences drawn from it are woefully inadequate to warrant relief under Rule 60(b)(6)." Id. (emphasis added).

Here, Mr. Rosenberg asserts that "the close relationship between this Court and an attorney of the firm representing the opposing party"—even where Mrs. Enslen was and is not a partner and where she performed absolutely no legal services whatsoever in K85-458—somehow resulted in the Court being biased in dismissing his bankruptcy appeal nearly three years earlier based upon Rosenberg's failure to file a timely appeal. Here his assertions of a "prejudicial relationship" and/or "biased decision-making" in the context of a non-discretionary decision is more speculative and tenuous than that presented in Margoles. See also Albright v. R.J. Reynolds Tobacco Company, 463 F. Supp. 1220 (W.D. Pa. 1979) (rejecting plaintiff's 60(b)(6) motion and holding that an allegation of bias in a dismissal based on failure to meet the jurisdictional amount was purely speculative).

Mr. Rosenberg has simply failed to present any evidence to warrant an inference that there was substantial danger that the underlying judgment in this case was somehow unjust. The Court finds this to be especially true given the strong policy favoring the finality of judgments in civil cases. It is well settled that "[j]udgments in civil cases fix the rights of parties and entitle them to go about their lives [and] may be reopened only for extraordinary reasons." Meltyn Realty Corp. v. Esmark, Inc., 763 F.2d 816, 830 (7th Cir. 1985).

The Timeliness of Rosenberg's Recusal Motion

The Sixth Circuit has indicated that a motion for recusal should be timely filed. Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984). In In re Bokum Resources Corporation, 26 Bankr. 615 (D.N.M. 1982), the district court held that the

appellant's Section 455 motion was untimely where appellant knew the facts which established the basis for his motion more than a month before he filed it.

Rosenberg knew of the "facts" which allegedly justify his 60(b) motion at least six months prior to the time he filed it because he raised the same disqualification issue for the first time in his petition for writ of certiorari in the Supreme Court of the United States dated December 21, 1987. Accordingly, the Court finds that Rosenberg's recusal motion is itself untimely.

The Recusal Motion

This Court is no longer certain that Mr. Rosenberg is pursuing recusal because in his Answer to Briefs Filed by Defendants Comerica Bank and Patrick Farrell, filed July 13, 1988 (6pp), he does not refer to recusal even once. Moreover, in his Memorandum attached to his Motion to Vacate...he asks the Court to (1) set aside its previous order; (2) disqualify itself; (3) set the matter for a status conference before a different judge. Thus, he seeks action first (not recusal) before he seeks disqualification. This request, like the styling of the various pleadings, causes this Court to be uncertain what Mr. Rosenberg seeks.

However, since at one time, at least, he did seek recusal under 28 U.S.C. Section 455, some analysis seems appropriate. That statute, in part, provides:

> (a)Any...judge...shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b)He shall also disqualify himself in the following circumstances:
>
> > (4)He knows that he...or his spouse...has a financial interest in the subject matter in con-

> troversy or in a party to the proceeding, or any other interest that could be substantially af fected by the outcome of the proceeding;
>
> (5)He or his spouse, or person within the third degree of relationship to either of them, or the spouse of such a person: ...
>
> (ii)Is acting as lawyer in the proceeding; ...

It is clear that subsection (a) of Section 455 sets out an "objective standard" for determining whether disqualification is required. On the other hand, subsection (b) sets out specific circumstances in which a judge must disqualify himself.

The Supreme Court has quite recently decided a case which is instructive in the matters presented to this Court. In Liljeberg v. Health Services Acquisition Corp., 56 U.S.L.W. 4637 (June 17, 1988) the Supreme Court noted that Section 455(a) can be violated based upon an appearance of impartiality, even though the judge was not conscious of the circumstances creating the appearance of impropriety, and that relief is appropriate under Rule 60(b) even when such a violation is not discovered until after the judgment has become final. Liljeberg held that:

> [S]ection 455 does not on its own, authorize the reopening of closed litigation. However, ...Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be re lieved of a final judgment. In particular, Rule 60(b)(6)...grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b) (1) through (b)(5)...Rule 60(b)(6) relief is accordingly

> neither categorically available or categorically un available for all Section 455 violations. We conclude that in determining whether a judgment should be vacated for a violation of Section 455 it is appropriate to consider the risk of justice to the parties in the particular case, the risk that the denial for relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Liljeberg, 56 U.S.L.W. at 4642 (emphasis added). In the case before me, the Court does not believe that Rule 60(b)(6) ought to be invoked simply because plaintiff's motion has not been brought within a reasonable time. Moreover, because of the non-discretionary nature of the original decision, under the guidelines set forth in Liljeberg, the Court concludes it would have to deny plaintiff's motion.

As assessment of the "risk of injustice to the parties" mandates that result. It is clear that Comerica purchased Superior's assets through a court-ordered bankruptcy sale. Moreover, Comerica then resold the assets to a corporation which is owned in part by Mr. Farrell. Mr. Farrell, as the court has previously noted, has used those assets in his business since that time and has invested substantial amounts of money for repairs and for additions to the assets. Although Rosenberg never appealed the decision of this Court, he did appeal subsequent decisions of the bankruptcy court with respect to the sale of Superior's assets and took those appeals through to the United States Supreme Court. He lost all of those appeals. The Court believes that Rosenberg is now seeking to collaterally attack those decisions.

Even if he had a colorable Section 455 motion before this Court, it is clear that applying the standards outlined in Liljeberg, granting his Rule 60(b) motion would bring about a grave injustice to the parties who have relied upon previous decisions of other courts as well as the November, 1985 opinion and order of this court. Vacating a nondiscretionary

decision based upon Rosenberg's Section 455 claim would undermine the public's confidence in the judicial process to the extent that the public would no longer be able to rely on the finality of decisions.

It is worth noting that Liljeberg emphasized that even where it appears that is would be appropriate to vacate a judgment based on a Section 455 violation, the judgment should not be vacated if "the party making the motion...did not make a timely request for relief, or [where it is shown] that it would otherwise be unfair to deprive the prevailing party of its judgment." Liljeberg, 56 U.S.L.W. at 4643.

Finally, this Court holds that Rosenberg has failed to allege facts sufficient to bring this matter within the specific circumstances requiring recusal under Section 455(b). It is clear that "[b]y its very terms the disqualification cited [Section 455(b)(5)(ii)] is applicable only when the relative is acting as a lawyer in the proceeding." Wilmington Towing Company, Inc. v. Cape Vera Towing Company, Inc., 624 F. Supp. 1210, 1211 (E.D.N.C. 1986) (emphasis in original). It is clear that there has been no participation by Mrs. Enslen in any aspect of this case during the time that it was before me. Accordingly, this situation does not come within the prohibition set forth in Section 455(b)(5)(ii). Section 455(b)(4) requires a recusal where a judge or his spouse has a financial interest in the outcome of a proceeding. It is well settled that an associate in a law firm as opposed to a partner, does not have the requisite financial interest in the outcome of the proceeding to warrant judicial disqualification based on his or her relationship with the judge. See e.g., United States ex. rel. Weinberger v. Equifax, Inc., 557 F.2d 456, 463 (5th Cir. 1977), cert. denied 434 U.S. 1035 (1978). Because Mrs. Enslen was an associate attorney and not a partner, prohibitive financial interest does not exist.

Rosenberg's pleadings arguably suggest that because Mrs. Enslen was a former law clerk of this Court that that relationship itself would give the appearance of impro-

priety under these facts, even though she did not work on his appeal. However, it is clear that the mere fact that an attorney was a judge's former law clerk is insufficient to support a motion for disqualification. In Varela v. Jones, 746 F.2d 1413 (10th Cir. 1984), the Tenth Circuit held that in a section 1983 action the trial court judge properly refused to recuse himself even though his former law clerk was one of the defendant's trial counsel and had handled the probate of estate of the judge's deceased mother during the discovery phase of the section 1983 case. The Varela court noted that there was nothing unusual in the probate proceeding and that the judge was not a client of the attorney. Further, the court emphasized that the judge did not appear to be a client of the attorney merely because he was a beneficiary under his mother's will.

In the case sub judice, Rosenberg has failed to allege any nexus between the complained of relationship and the issues presented in his appeal of the bankruptcy order. Accordingly, his "automatic recusal" argument is patently without merit.

In the context of numerous adverse rulings from the bench it has been said that "[the recusal statute] was never intended to enable a litigant to oust a judge for adverse rulings made, for such rulings are reviewable otherwise..." (citation omitted). Further "[a] trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor one one litigant, he may have created the impression of bias...'A timid judge, like a biased judge is intrinsically a lawless judge.' [citation omitted]. In Re Bokum Resources Corp., 26 Bankr. at 621 citing In re International Business Machines Corp., 618 F.2d 923, 939 (2d Cir. 1980).

A fortiori, a judge must be able to make non-discretionary [jurisdictional] rulings without fear of speculative assertions of bias based upon the mere existence of private relationships—especially where those relationships have no

connection to the issues presented in the case and where the connection between those relationships and the parties is remote at best.

In conclusion, because the Court finds that Rosenberg's Section 455 motion is without merit, because his recusal claim and his 60(b)(6) motion appear to be untimely, and under the authority of Liljeberg, the Court will enter an order denying Rosenberg's motion to vacate and set aside.

DATED in Kalamazoo, MI:
July 27, 1988

RICHARD A. ENSLEN
U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

In the Matter of:
SUPERIOR METAL SHREDDER, INC.
DAVID ROSENBERG File No. K85-458

Debtor

_____ _____/

AS STYLED BY DAVID ROSENBERG
IN THE INSTANT MOTION:

DAVID ROSENBERG,

Plaintiff/Appellant,

v. File No. K85-458

COMERICA BANK
and
PATRICK H. FARRELL

Defendant/Appellees.

_____/

JUDGMENT ORDER

In accordance with the opinion entered July 27, 1988:

IT IS HEREBY ORDERED that Rosenberg's motion to vacate and/or set aside prior order of dismissal under Rule 60 is DENIED.

DATED in Kalamazoo, MI:
July 27, 1988

RICHARD A. ENSLEN
U.S. District Judge

APPENDIX IC

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

In the Matter of
SUPERIOR METAL SHREDDER, INC.
DAVID ROSENBERG File No. K85-458

Debtor
_____/

AS STYLED BY DAVID ROSENBERG
IN THE INSTANT MOTION:

"DAVID ROSENBERG,

Plaintiff/Appellant,

vs. File No. K85-458

COMERICA BANK
and
PATRICK H. FARRELL,

Defendants/Appellees. [sic]:
_____/

OPINION

Currently before this Court is David Rosenberg's petition for writ of mandamus for recusal under 28 U.S.C. Section 1361 (1983). The lengthy procedural background to this case may be found in the Court's Opinions of November 7, 1985 and July 27, 1988.

Even though Mr. Rosenberg has, once again, not styled case number K85-458 in an appropriate fashion, but has rather styled it in a fashion which he deems appropriate, he continues to use the original file number of K85-458, which is correct. On this filing, Mr. Rosenberg uses further ingenuity by deciding to "change judges." He, therefore, types in the name "Honorable Douglas W. Hillman" on the petition even though the case has been assigned to the undersigned since 1985. The Clerk of the Court thus, properly, sent the petition to the judge to whom it has always been assigned.

Title 28 of the United States Code, entitled "Judicial Code and Judiciary," grants original jurisdiction to federal district courts concerning "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. Section 1361 (1983).

The relevant words in the statute are "an officer or employee of the United States or any agency thereof." Neither Judge Hillman, nor the undersigned, are within this statutory category. It is clear that under Section 1361, neither of us, both federal district judges, have the power to grant a writ of mandamus against the other or against any other judge of Article III status; nor may we grant such writs against ourselves. See e.g. In re Charge of Judicial Misconduct, 700 F.2d 1391, 1392 (9th Cir. 1983); Liberation News Service v. Eastland, 426 F.2d 1379, 1384 (2d Cir. 1970).

I will therefore treat Mr. Rosenberg's inappropriately styled petition for a writ of mandamus as a motion to reconsider this Court's decision on his most recently filed motion under Federal Rule of Civil Procedure 60 (b). For all the reasons stated in my Opinion of July 27, 1988, the motion for reconsideration is denied and, of course, does not effect the finality of the 1985 judgment, nor does it suspend its operation.

DATED in Kalamazoo, MI:
September 7, 1988

RICHARD A. ENSLEN
U.S. District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

In the Matter of
SUPERIOR METAL SHREDDER, INC.
LAVID ROSENBERG File No. K85-458

Debtor
_____/

AS STYLED BY DAVID ROSENBERG
IN THE INSTANT MOTION:

"DAVID ROSENBERG,

Plaintiff/Appellant,

vs. File No. K85-458

COMERICA BANK
and
PATRICK H. FARRELL,

Defendants/Appellees. [sic]"
_____/

ORDER

In accordance with the opinion entered September 7, 1988;

IT IS HEREBY ORDERED that Mr. Rosenberg's motion is DENIED.

DATED in Kalamazoo, MI:
September 7, 1988

_____
RICHARD A. ENSLEN
U.S. District Judge

APPENDIX ID

88-1997

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re:	)	
	)	
David Rosenberg,	)	
	)	
Plaintiff-Petitioner.	)	ORDER

Before: ENGEL, Chief Judge; WELLFORD and BOGGS, Circuit Judges.

The petitioner has submitted to this Court a document entitled "Petition for Writ of Mandamus for Recusal Under Title 28 Sec. 1361." Therein, he asks this Court to remove District Judge Richard A. Enslen of the Western District of Michigan from a civil proceeding therein and to vacate a 1985 order entered by Judge Enslen. In response to the above petition, the district court has submitted copies of two recent orders entered in that civil proceeding.

The underlying civil action arose in bankruptcy proceedings. In 1985, the bankruptcy court entered an order setting aside a prior abandonment of the debtor's assets, thereby permitting their sale by the trustee. Judge Enslen dismissed an appeal therefrom on grounds the appeal was untimely. Judge Enslen also indicated the appeal was without merit. In 1988, the petitioner filed a motion to vacate that order under Rule 60 (b), Federal Rules of Civil Procedure, on grounds Judge Enslen should have recused himself in 1985.

Judge Enslen entered an order on July 27, 1988, denying the motion to vacate on grounds (1) the motion was not brought within a reasonable time, (2) the motion had no substantial basis, (3) the suggestion of recusal was itself untimely, and (4) there was no basis for recusal. The petitioner then filed a petition for a writ of mandamus for recusal under Section 1361. Judge Enslen, holding that Section 1361 could not be used for such purposes, treated the petition as a motion for reconsideration of the July order and denied relief. That order was entered on September 7, 1988. The present petition was filed in this Court on October 13, 1988.

To the extent the petitioner seeks an order from the Court requiring Judge Enslen to recuse himself from the proceedings below, his petition must be construed as a petition for a writ of mandamus under 28 U.S.C. Section 1651. This Court has repeatedly held, however, that issues pertaining to recusal will not be reviewed by this Court via a mandamus petition. See In re City of Detroit, 828 F.2d 1160, 1165-67 (6th Cir. 1987), and cases cited therein. We are therefore not called upon to decide whether or not, under the circumstances and because of his wife's position, Judge Enslen was required to recuse himself.

To the extent the petitioner seeks review of the order denying his Rule 60 (b) motion, the proper course would have been to file a direct appeal from that order. See Peake v. First National Bank and Trust Company of Marquette, 717 F.2d 1016, 1020 (6th Cir. 1983) (the denial of a Rule 60 (b) motion is appealable). A mandamus petition cannot be used as a substitute for an appeal. City of Cleveland v. Krupansky, 619 F.2d 572, 575 (6th Cir.) (per curiam), cert. denied, 499 U.S. 834 (1980). Because the present petition was filed more than thirty (30) days after entry of the September 7 order, we likewise cannot construe it as a notice of appeal mistakenly filed in this Court. See Rule 4(a)(1), Federal Rules of Appellate Procedure.

It therefore is ORDERED that the petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX IE

No. 88-1997
United States Court of Appeals
for the Sixth Circuit

In Re: David Rosenberg,	)	
	)	ORDER
Plaintiff-Petitioner.	)	
	)	

Before: ENGEL, Chief Judge; WELLFORD and BOGGS, Circuit Judges.

On November 17, 1988, this Court entered an order denying the petitioner's mandamus petition in which he sought the retroactive disqualification of a district judge from 1985 bankruptcy proceedings. The petitioner seeks reconsideration of that order. He asks the Court not so much to reconsider the denial of mandamus relief, but to construe his petition as a notice of appeal.

The petitioner was the president and owner of a business whose assets were sold in bankruptcy proceedings. In 1988, the petitioner filed a motion to vacate judgment under Rule 60 (b), Fed. R. Civ. P., asserting the district judge should have recused himself from participating in certain proceedings in 1985 because of potential bias. The district court denied that motion on July 27, 1988.

Thereafter, on August 26, 1988, the petitioner filed in the district court a mandamus petition seeking the disqualification of the district judge. The district court construed that petition as a motion for reconsideration and denied it as such on September 7, 1988.

The petitioner then filed an almost identical mandamus petition with this Court. This panel denied relief, holding that issues pertaining to the disqualification of district court judges could not be the subject of a mandamus action. We also noted the petitioner could have appealed the denial of the Rule 60 (b) motion, but failed to do so. Finally, we observed that the mandamus petition itself could not be construed as a notice of appeal because it was not filed within thirty (30) days of the order denying the motion for reconsideration.

In his present motion, the petitioner does not challenge our determination that his petition, as a mandamus petition, should be denied. Rather, he asserts his petition in fact was submitted to this Court within thirty (30) days of the denial of reconsideration and thus should be construed as a notice of appeal erroneously filed in this Court. See Rule 4(a)(1), Fed. R. App. P.

An examination of our records shows the petitioner to be correct as to the submission of his petition herein. The petition was submitted on September 19, 1988, but was not filed at that time because the petitioner did not sign the accompanying money order. Thus, the actual filing of the petition did not occur until October 13, 1988. These facts require us to re-examine in greater detail the possible basis for an appeal.

As we noted in our prior order, the denial of a Rule 60(b) motion is a final order immediately appealable under 28 U.S.C. Section 1291. The 30-day period for filing the notice of appeal, therefore began to run on July 27, 1988. Because the petitioner did not file a notice of appeal (or anything that could be construed as a notice of appeal) by August 26, 1988, the crucial question is whether the mandamus petition filed in the district court on that date (and construed as a motion for reconsideration) tolled the time to file a notice of appeal.

Rule 4(a)(4), Fed. R. App. P., lists four types of motions which will toll the running of time to file a notice of appeal. One of these is a motion to alter or amend judgment under Rule 59 (e), Fed. R. Civ. P. In this Circuit, motions for reconsideration are properly construed as Rule 59(e) motions. Huff v. Metropolitan Life Insurance Co., 675 F.2d 119, 122 (6th Cir. 1982). Such motions toll the appeal period, however, only if they are timely, i.e., served within ten days of the order for which consideration is sought. Peake v. First National Bank & Trust Co., 717 F.2d 1016, 1019 (6th Cir. 1983). Here, the mandamus petition/motion for reconsideration was not served within that time and did not toll the period for filing a notice of appeal. The fact the district court ruled upon the untimely motion does not affect that conclusion. Denley v. Shearson/American Express, Inc., 733 F.2d 39, 41 (6th Cir. 1984). As a result, the mandamus petition submitted to this Court on September 19, 1988, even if construed as a notice of appeal, would impart no appellate jurisdiction herein. This Court has no authority to extend the 30-day period for filing a notice of appeal. Rule 26 (b), Fed. R. App. P. We therefore decline the petitioner's request to construe his mandamus petition as a notice of appeal.

It therefore is ORDERED that the motion for reconsideration is denied.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX IIA

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

In Re:

SUPERIOR METAL
SHREDDERS, INC.,

Case No. HK 80-03369

Debtor.

_____/

COMERICA BANK-KALAMAZOO,
a Michigan Banking Corporation,

Plaintiff - Appellee,

v.

Case No. K 86-35CA4
Hon. Benjamin F. Gibson

DAVID ROSENBERG,

Defendant - Appellant.

_____/

ORDER DENYING MOTION FOR STAY PENDING APPEAL, AND ORDER DISMISSING APPEAL

At a session of said Court, held in the Federal Building in Grand Rapids, Michigan, on February 10, 1986.

PRESENT: Honorable Benjamin F. Gibson
United States District Court Judge

Upon reading and filing the Motion for Expedition of Trial filed by Appellant, David Rosenberg (hereinafter "Rosenberg"), requesting a stay pending appeal, and the Court having heard the arguments of the parties at a hearing held on February 10, 1986, and the Court having reviewed the Opinion and Judgment of United States District Court Judge Richard A. Enslen, in the matter of Superior Metal Shredders, Inc., File No. K 85-458, and the Court having concluded as a matter of law that the issues raised by Rosenberg concerning abandonment and ownership of assets are barred by res judicata by reason of Judge Enslen's Opinion of November 7, 1985, and that the present appeal and the Motion for Stay Pending Appeal have been rendered moot by reason of Rosenberg's failure to obtain a stay pending appeal before the date of the sale, and the Court having reviewed the Memorandum of Law and Exhibits filed by Comerica Bank-Kalamazoo, the Court being otherwise fully informed in the premises:

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The Motion for Expedition of Trial filed by Appellant David Rosenberg requesting a stay pending appeal is denied.

2. This case and this appeal shall be, and hereby is, dismissed.

_____

Benjamin F. Gibson
United States District
Court Judge

APPENDIX IIB

No. 86-1273
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID ROSENBERG, Plaintiff-Appellant,	)
	)ON APPEAL FROM THE
v.	)UNITED STATES DISTRICT
	)COURT FOR THE WESTERN
	)DISTRICT OF MICHIGAN
COMERICA BANK and PATRICK J. FARRELL, Defendants-Appellees.)	)

BEFORE: Ryan and Boggs, Circuit Judges; and Brown, Senior Circuit Judge.

PER CURIAM. Superior Metal Shredders (SMS), of which David Rosenberg was president and owner, filed for bankruptcy in 1980. In this bankruptcy proceeding, the assets of the corporation were eventually sold under court order in November of 1985. Rosenberg has made a variety of efforts to prevent and then undo this sale of assets, culminating in this appeal. Finding his contentions on appeal to be moot or without merit, we affirm the decisions below confirming the sale and refusing to interfere with the transfer of property and the distribution of proceeds by the bankruptcy court.

I

SMS filed a petition for Chapter 11 bankruptcy in 1980. The bankruptcy was converted to Chapter 7 in October

1984. In February 1985 the Trustee abandoned the assets of SMS, which reverted without objection to SMS and thus to Rosenberg.

On April 30, 1985, appellee, Comerica Bank, a creditor of SMS, filed an adversary proceeding to set aside the abandonment, determine the extent of the bankrupt corporation's assets, and require that the assets be sold. The bankruptcy court conducted an initial hearing and set aside the abandonment, then reconsidered its order upon its own motion. After another hearing, the court affirmed its earlier order and on August 6, 1985 ordered the abandonment set aside. On August 20, Rosenberg filed an "objection" to the August 6 order.[1]

On October 2, the court entered an order directing the sale of the assets on October 11. On October 8, Rosenberg filed a notice of appeal from the August 6 order to the district court. He also moved both the bankruptcy court and the district court for a stay of the sale of assets. On October 10 the bankruptcy court entered an order denying the "objection," adjourned the sale until November 8, and entered an order to show cause by November 8 why the sale should not take place.

On October 30 and 31, the bankruptcy court conducted a trial of the adversary proceeding to determine the parties' interests in the assets to be sold. On November 1, the bankruptcy court entered its findings that Comerica held a valid perfected security interest in SMS's tangible assets, a lien in other assets owned by Rosenberg, and denied Rosenberg's motion for a stay of the sale pending appeal. On November 7, the district court denied his motion for stay and dismissed his appeal from the bankruptcy court's decision

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[1] This "objection" was later held by the district court to be a motion to amend judgment under Rule 59, Fed. R. Civ. P., though filed outside the time allowed for such motion as computed through Bankruptcy Rule 9006.

on the ground that the "objection" to the August 6 order was not timely filed pursuant to Bankruptcy Rule 9006, and , in the alternative, on the ground that the bankruptcy court's decision was not clearly erroneous. Rosenberg does not now appeal the dismissal of this first appeal.

On November 8, Comerica Bank purchased the bankrupt corporation's assets for $500,000. That sale was confirmed by the bankruptcy court in its order of November 15. On November 12, Rosenberg filed a second appeal with the district court, and moved the bankruptcy court to restrain Comerica from removing or selling any assets pending appeal. The bankruptcy court denied the later motion from the bench on January 31, 1986, holding that Comerica held a greater likelihood of success on the merits than did Rosenberg, and would be irreparably harmed if a stay were granted.

The district court heard Rosenberg's second appeal on February 10, 1986. The district court determined that all but one of the issues raised in the second appeal had been adjudicated in the first appeal, and were therefore res judicata to the second appeal. Only the issue of whether the sale of assets should be stayed pending appeal was not resolved in the first appeal, as the sale had not been consummated at that time. The district court held that, as Rosenberg had failed to obtain a stay of the sale, the property transfer became final, making the appeal of the sale moot. Thus, the district court denied the stay and dismissed the second appeal on February 10. Rosenberg has filed a notice of appeal to this court and now moves this court for a stay of the distribution of money by the bankruptcy court pending his appeal

II

We agree with the district court that the overwhelming majority of the issues raised in the second appeal were barred by res judicata. Rosenberg's failure to obtain a stay of the November 8, 1985 sale of assets is fatal to the only

remaining issue in his appeal of the district court's February 10, 1986 disposition of his second appeal. Section 363 (m) of the Bankruptcy Code, 11 U.S.C. Section 363 (m), provides that a reversal or modification on appeal of a sale of property does not affect the validity of a sale to a good faith purchaser, unless the sale is stayed pending the appeal. Rosenberg did not obtain a stay of the sale. The record does not reflect that the sale was in bad faith. Thus, regardless of the merits ab initio of Rosenberg's contentions, any challenge to the validity of the stay is moot. The decision of the district court is therefore AFFIRMED.

ISSUED AS MANDATE: October 19, 1987

COSTS: NONE

APPENDIX IIC

NO. 86-1273

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAVID ROSENBERG,	:	
	:	
Plaintiff-Appellant	:	
	:	
vs.	:	ORDER
	:	
COMERICA BANK AND PATRICK J. FARRELL,	:	
	:	
Defendants-Appellees	:	

BEFORE: RYAN and BOGGS, Circuit Judges; BROWN, Senior Circuit Judge

This matter is before the court upon consideration of the appellant's petition for rehearing of this court's per curiam opinion of May 7, 1987, which affirmed the decision of the district court.

After careful consideration of the petition, the court concludes that it misapprehended no questions of law or fact in its order.

Therefore, it is **ORDERED** that the petition for rehearing be and hereby is **denied.**

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk